Office - Supreme Court, U.S.
FILED
JUN 24 1982
ALEXANDER L. STEVAS,
CLERK

81-2377

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1981

VERA GIANECHINI, INDIVIDUALLY AND AS TUTRIX OF THE ESTATE OF DAVID GIANECHINI AND AS EXECUTRIX OF THE ESTATE OF ERNEST GIANECHINI

VERSUS

CITY OF NEW ORLEANS, NEW ORLEANS FIRE DEPARTMENT ARTHUR TURNER, JOSEPH FRICANO, EARLY AMERICAN INSURANCE COMPANY AND X, Y, AND Z INSURERS

ON APPEAL FROM THE LOUISIANA SUPREME COURT

JURISDICTIONAL STATEMENT

SESSIONS, FISHMAN, ROSENSON, BOISFONTAINE & NATHAN
ROBERT E. WINN (Trial Attorney)
2500 Pan American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
(504) 581-5055

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED

1. Is the denial of a right to trial by jury in a personal injury and wrongful death action against the City of New Orleans in a state court proceeding a denial of equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution?

2. Is the denial of a right to trial by jury in a personal injury and wrongful death action against the City of New Orleans a denial of due process of law in violation of the Fourteenth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

Vera Gianechini, individually, and on behalf of her minor son David Gianechini, and as executrix of the estate of Ernest Gianechini, appellant.

The City of New Orleans, appellee.

(Arthur Turner and Joseph Fricano, firemen employed by the City of New Orleans, were defendants in the district court; the dismissal of the action against them is not appealed.)

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities iv

Opinions below 2

Jurisdiction 2

Constitutional provisions and statutes involved 3

Statement 4

The question is substantial 6

Conclusion 15

Appendix A A-1

Appendix B A-7

Appendix C A-27

Appendix D A-29

Appendix E A-33

TABLE OF AUTHORITIES

Cases: **Page**

Board of Commissioners of the Port of New Orleans v. Splendour Shipping & Enterprises Co., 273 So. 2d 19 (La. 1973) 9

Carter v. City of New Orleans, 327 So. 2d 488 (La. App. 4th Cir. 1976) 9, 11

Chatzicharalambus, 73 F.R.D. 417 (E.D. La. 1977) 7

Jones v. City of Kenner, 338 So. 2d 606 (La. 1976) 7, 9, 10, 11

Triche v. City of Houma, 342 So. 2d 1155 (La. App. 1st. Cir. 1977) 7

Constitutions, statutes:

United States Constitution:
Fourteenth Amendment ..... i, 3, 9, 11, 12

Louisiana Constitution of 1974
Article 1, Sections 3 and 22 ..... 11, 12, 14
Article 12, Section 10 ..... 9, 10, 11, 12

28 U.S.C. §1257(2) (1976) 2

La. Rev. Stat. Ann. §13:5105 (West Supp. 1982) 3, 7, 10, 11, 12, 13, 14, 15

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO._____

VERA GIANECHINI, INDIVIDUALLY AND AS TUTRIX OF THE ESTATE OF DAVID GIANECHINI AND AS EXECUTRIX OF THE ESTATE OF ERNEST GIANECHINI

VS.

CITY OF NEW ORLEANS, NEW ORLEANS FIRE DEPARTMENT, ARTHUR TURNER, JOSEPH FRICANO, EARLY AMERICAN INSURANCE COMPANY AND X, Y, AND Z INSURERS

ON APPEAL FROM THE LOUISIANA SUPREME COURT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The trial court's judgment and reasons for judgment, (App. A, *infra*) dated January 10, 1980, are not officially reported. The decision of the Louisiana Court of Appeals for the Fourth Circuit, affirming the trial court (App. B, *infra*) is reported at 410 So. 2d 292 (La. App. 4th Cir. 1981). The denial of the writ of review by the Louisiana Supreme Court, (App. C, *infra*) dated March 26, 1982, is reported at 412 So. 2d 1109 (La. 1982).

JURISDICTION

This is an appeal from the denial of a writ of review by the Louisiana Supreme Court on March 26, 1982. No application for rehearing is permitted by Louisiana law. Appellant's notice of appeal to the United States Supreme Court was filed with the Louisiana Supreme Court, the Louisiana Court of Appeal for the Fourth Circuit, and the Civil District Court for the Parish of Orleans on June 9, 1982. This appeal is taken pursuant to 28 U.S.C. §1257(2) (1976).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This appeal involves the constitutionality of La. Rev. Stat. Ann. §13:5105 which was the recited basis for the denial of a jury trial to appellant. La. Rev. Stat. Ann. §13:5105 provides:

> "No suit against the state or a state agency or political subdivision shall be tried by jury."

Appellant contends that La. Rev. Stat. Ann. §13:5105 violates the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution which reads, in pertinent part, as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United states and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

The question presented is whether Vera Gianechini, on her own behalf and on behalf of her minor son, should have been afforded a jury trial in her personal injury and wrongful death action against the City of New Orleans. On September 16, 1976, Mrs. Gianechini's husband suffered a heart attack while dining at a New Orleans restaurant. The ambulance that responded was manned by the Fire Department of the City of New Orleans. Because of what Mrs. Gianechini alleges was the negligence of the City of New Orleans in manning and equipping the ambulance and because of the alleged negligence of the two city firemen who responded to the emergency call, Mr. Gianechini suffered permanent brain damage, suffered excruciatingly for about seven months, and died of a complication of his condition.

Suit was brought against the City for its own negligence and for the negligence of its employees. Suit was also brought against the two firemen. Louisiana law permitted a jury trial against the two individual firemen, but liability on their part could only be founded on an intentional act gross negligence standard. Mrs. Gianechini requested a jury trial against the City both for its direct negligence and for its respondeat superior responsibility. The City moved to strike the jury request against it, and the trial judge granted the motion. The denial of a jury trial against the City was affirmed by the Court of Appeal and the Louisiana Supreme Court denied a writ of review.

Appellant proceeded to trial with a jury against the two firemen on an intentional act gross negligence standard, and there was a finding on behalf of the individual firemen dismissing the action as to them. Appellant's action against the City was tried to the judge alone. The district judge held that the City was negligent in its equipping of the ambulance, but found that the negligence was not a proximate cause of Mr. Gianechini's suffering and death. The jury's determination as to the liability of the firemen and the judge's determination of no liability on the part of the City was upheld by the appellate court, and the Louisiana Supreme Court refused to review the decision of the Court of Appeals.

No question is raised here as to the propriety of the jury's verdict dismissing the action against the firemen. Nor is there any appeal on the merits of the trial judge's decision on the City's liability. Appellant Vera Gianechini's objection is that she was not afforded a trial by jury against the City, and the liability of the City was determined only by an elected official of the State of Louisiana. Appellant Vera Gianechini for herself and for her son appeals the denial to her by the courts of Louisiana of a trial by jury in her action against the state of Louisiana, or more precisely against a political subdivision of the state of Louisiana, the City of New Orleans.

THE QUESTION IS SUBSTANTIAL

In no other circumstance is a citizen more in need of a jury trial than when his action is brought against the state or a political subdivision thereof. Especially today when government involvement in our every day lives is so commonplace, and particularly as government exercises increasing ownership, control and regulation of basic services, it is necessary that when the government does injury to one of its citizens, its liability for that injury should not be assessed only by a government official. The hapless plaintiff, whose claim must be passed upon only by an official of the government, is particularly unfortunate in this day of budgetary restraint and financial concern when cities and states, Louisiana and New Orleans not excepted, are hard pressed financially.

Indeed, some advance the financial condition of state and local governments as a reason for prohibiting the right to trial by jury to citizens who bring actions against state and local governments. This opposition to a jury trial is itself clear testimony to the crucial unfairness of requiring that a citizen's claim against a city or state be passed upon only by an offical of the state government, in this case, a Civil District Court judge for the Parish of Orleans, State of Louisiana.

The assumption is that a judge will be more protective of the interests of the state than will a jury of citizens. If that is true, it demonstrates the denial of equal protec-

tion and due process caused by denial of a jury trial. In the instant case, if the responding ambulance had been privately operated, or city operated but insured, appellant would have been afforded a jury trial. La. Rev. Stat. Ann. §13:5105; *Jones v. City of Kenner*, 338 So. 2d 606 (La. 1976). Additionally, if Mrs. Gianechini was not an American citizen and the action had been brought in federal court, a jury would have been available against the City notwithstanding the provisions of La. Rev. Stat. Ann. §13:5105, which would require that any suit against the state or a political subdivision thereof be brought in a Louisiana state court without a jury. *Chatzicharalambus*, 73 F.R.D. 417 (E.D. La. 1977).

Ironically, if the state wants a jury trial in a suit against a citizen, Louisiana law permits it; and if the state or a political subdivision is sued and it wants a jury, it is entitled to one. *Triche v. City of Houma*, 342 So. 2d 1155 (La. App. 1st Cir. 1977). Sadly for appellant, she had only recently become an American citizen and was unable to proceed in federal court, and the City of New Orleans had become self-insured in tort actions less than thirty days before her husband's heart attack. (See App E). Certainly the fundamental rights of citizens should not be subject to such insubstantial vagaries.

Not only is a denial of a jury trial manifestly unfair to the aggrieved citizen, but such insulation of the state and city from a judgment of its conduct by its citizens can only contribute to government irresponsibility. This is un-

deed unfortunate today considering government involvement in every aspect of each citizen's life.

There is no dispositive decision in the federal system, in any of the Circuits or in the United States Supreme Court, on the question of the constitutionality of a denial of a citizen's right to trial by jury against a state or a political subdivision thereof. An agrument often advanced for denying a citizen a right to a jury trial against a state is that no such right is afforded a citizen against the United States. The wisdom of such a denial is irrelevant to a consideration of the constitutionality of the denial of a jury trial against a state or a political subdivision of a state.

It is often argued that since the Seventh Amendment to the United States Constitution only required a jury trial in suits at common law and since at common law no suit was permitted against the sovereign, the Seventh Amendment does not require a jury trial against the United States government. Even conceding that the Seventh Amendment does not require a jury trial against the United States, it does not follow that there could be no constitutional requirement founded on another provision of the Constitution which might require a jury trial against the United States. But however that argument might be decided, that is not the issue confronted here; Louisiana is not the United States, and Louisiana's legal system is not founded on the common law.

Additionally, a Louisiana citizen's right to sue the

state is not founded on a statute, but is the result of the Louisiana Supreme Court's finding in *Board of Commissioners of the Port of New Orleans v. Splendour Shipping & Enterprises Co.*, 273 So. 2d 19 (La. 1973), that the doctrine of sovereign immunity was unnecessary, fundamentally unfair, and a denial of due process. In the 1974 Louisiana Constitution the reasoning of *Splendour* was confirmed; Louisiana now has constitutionally abolished sovereign immunity. (La. Const. Art. XII, §10.)

The argument, therefore, that since the sovereign was historically immune from suit, the sovereign could consent to suit subject to whatever conditions it elected to impose, would have no effect in Louisiana. Sovereign immunity was found to be unconstitutional, so consequently, there is no basis for suggesting that the State of Louisiana, in waiving its immunity from suit, is entitled to impose any limitation or restriction that it chooses. Even if the state were permitted to impose restrictions, its authority would be limited by the United States Constitution, particularly the Fourteenth Amendment.

Not only is there no dispositive decision in the federal system, there are no Louisiana decisions that in any way justify the denial to Mrs. Gianechini of the right to a jury trial against the City. In truth, the only two cases cited by the Louisiana Court of Appeals provide very little support for the denial of a jury trial. In both *Jones v. City of Kenner, supra*, and *Carter v. City of New Orleans*, 327 So. 2d 488 (La. App. 4th Cir. 1976), the only questions rais-

ed about the denial of a jury trial were procedural, and neither case came to grips with the precise question raised here, viz., the constitutionality *vel non* of the statute as a substantive provision of law, under equal protection analysis.

In *Jones*, the Louisiana Supreme Court did uphold the constitutionality of La. Rev. Stat. Ann. §13:5105, but Justice Tate (now Judge, United States Court of Appeals Fifth Circuit) specifically states that the Court was so ruling "on the basis of the sole argument urged to us," which was a *procedural* attack. There the question was simply whether La. Rev. Stat. Ann. §13:5105 contravened Article 12, §10 of the Louisiana Constitution of 1974, which abolished the sovereign immunity protection previously afforded to states, state agencies or political subdivisions thereof. Justice Tate quite narrowly found that Subsection C of that constitutional provision authorized the Legislature "to provide a procedure" for suits against public bodies, but went on to specifically restrict the Court's ruling to the narrow question of whether La. Rev. Stat. Ann. §13:5105 violated that particular procedural provision of the Louisiana Constitution. Thus, the Court specifically stated:

> *"On the basis of the sole argument urged to us*, we are unable to hold that the *procedural* authorization of non-jury trial offends Article 12, Section 10 of our 1974 constitution." (Emphasis added) *Id.*, 338 So. 2d at 608.

Not only did the Louisiana Supreme Court not meet the substantive constitutional question which is raised here, but the opinion is notable for the absence of any mention of "equal protection" and the absence of any reference to other provisions of the Louisiana Constitution or to the Fourteenth Amendment to the United States Constitution. By specifically stating that the Court was limiting its ruling to "the basis of the sole argument urged," Justice Tate was in effect inviting the substantive attack now launched in this case.

In *Carter, supra*, the Fourth Circuit Court of Appeal also upheld the constitutionality of La. Rev. Stat. Ann. §13:5105. That finding, however, was also in response to the question of whether the statute violated Article 12, §10 of Louisiana Constitution of 1974. The majority opinion considered the statute on that procedural ground and no "equal protection" argument was made or even referred to in the majority opinion. In dissent, however, Judge Redmann clearly recognized the distinction between the procedural attack launched in *Carter* (and later in *Jones*) and a substantive constitutional challenge, and cogently reasoned that La. Rev. Stat. Ann. §13:5105 indeed contravenes the equal protection clauses of the Louisiana Constitution, Article 1, §§3 and 22, and the Fourteenth Amendment to the United States Constitution:

> "REDMANN, Judge (dissenting).
>
> "Sovereign immunity from civil jury trial, a relic from but no longer

supportable by the discredited and abolished doctrine of complete sovereign immunity, is inconsistent with the equal protection guarantee of La. Const. art. 1 §§3 and 22 (and if not, then with that of U.S. Const. Amend. 14). La. R.S. 13:5105's prohibition of civil jury trial against the state or its political subdivisions is therefore unconstitutional.

"The authorization by La. Const. Art. 12 §10(C) of enactment of 'a procedure' for suits against the state means a procedure consistent with the constitution: consistent with the due process guarantees of art. 1 §§3 and 22, consistent with the equal protection guarantees of art. 1 §§3 and 22, and consistent with every other word of every section of every article of the constitution. Authorization of 'a procedure' does not authorize refusing a plaintiff cross-examination of the State's witnesses—though cross-examination is a matter of procedure—because the due process clauses guarantee the right of cross-examination. And authorization of 'a procedure' does not authorize prohibiting jury trial (or judge trial!) to some plaintiffs on the basis of the personality of their defendants—though jury trial be a matter of procedure—because the

equal protection and justice administered without partiality clauses guarantee that laws cannot be applied differently to different classifications to persons unless there is a rational basis to the classification.

"Neither the City nor the Attorney General has suggested any rational basis for classifying persons allegedly injured by the state (or its servants) into a category not entitled to the determination of liability by a jury and the assessment of damages with 'much discretion' by the 'jury', C.C. 1934 (3). (The Attorney General suggests that the state's 'deep pockets' might subject it to unfair treatment by juries. So might the deep pockets of large corporations and wealthy individuals. R.S. 13:5105, however, does not classify all wealthy defendants as exempt from jury trial, but only the state and its subdivisions.)

"Except for R.S. 13:5105, Louisiana law limits denial of jury trial to classifications of *causes of action*, such as demands for less than $1,000, or probate matters, C.C.P. 1733. (I interject here, without equal-protection analysis, that R.S. 13:5035 *grants* civil jury trial to

> citizens against the state when the state is *plaintiff*!)
>
> "R.S. 13:5105's prohibiting civil jury trial against the state as defendant makes no more sense than would prohibiting civil jury trial against redheads as defendants. It is whimsy. It deprives plaintiffs injured by the state of equal protection of the jury-trial law. It is therefore unconstitutional because violative of La. Const. Art. 1 §§3 and 22."
>
> *Id.*, 327 So. 2d at 491-92.

That a litigant facing the city or a political subdivision thereof is at a distinct disadvantage in a judge trial is not susceptible to proof. It is suggested that to believe that there is no disadvantage is to ignore the common experience of the trial bar. What is beyond dispute, however, is Louisiana's resistance to permitting a jury trial in suits filed against it; this clearly suggests that the state perceives that it has the advantage in a non-jury trial. How can it be otherwise when only the state has the option of a jury or bench trial? Also beyond dispute is that litigants against the state perceive themselves to be at a great disadvantage when denied a trial by jury, and one of the values sought by affording equal protection of the law is to avoid such citizen dissatisfaction and suspicion.

There was no justifiable or rational basis for denying a jury trial to Mrs. Gianechini in her suit against the City

of New Orleans. The denial was a clear violation of her rights to equal protection of the laws and due process accorded by the United States Constitution.

CONCLUSION

In view of the manifest unfairness and clear unconstitutionality of La. Rev. Stat. Ann §13:5105 denying Mrs. Gianechini a right to jury trial, probable jurisdiction should be noted.

Respectfully submitted,

Sessions, Fishman, Rosenson,
Boisfontaine & Nathan
Robert E. Winn (Trial Attorney)
2500 Pan American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 581-5055

By _____
ROBERT E. WINN
ATTORNEYS FOR VERA GIANECHINI INDIVIDUALLY AND AS TUTRIX OF THE ESTATE OF DAVID GIANECHINI AND AS EXECUTRIX OF THE ESTATE OF ERNEST GIANECHINI

PROOF OF SERVICE-CERTIFICATE BY BAR MEMBER

I, Curtis R. Boisfontaine, one of the attorneys for Vera Gianechini, Individually and as Tutrix of the Estate of David Gianechini and as Executrix of the Estate of Ernest Gianechini, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the _____ day of June, 1982, I served copies of the foregoing Jurisdictional Statement on the several parties thereto, as follows:

1. On the City of New Orleans, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, through City Attorney's Office, City Hall, New Orleans, Louisiana 70112.

2. On defendants, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

To Ronald J. Favre, Esq., Attorney for City of New Orleans, 901 First N.B.C. Building, New Orleans, Louisiana 70112

To John P. Nelson, Jr., Esq., Attorney for Arthur Turner and Joseph Fricano, 1001 Howard Avenue, Suite 4304, New Orleans, Louisiana 70113.

3. On the State of Louisiana by service upon:
Louisiana Attorney General
William J. Guste, Jr.
State Capitol
P.O. Box 44005
Baton Rouge, Louisiana 70804

CURTIS R. BOISFONTAINE
Attorney for Vera Gianechini, Individually and as Tutrix of the Estate of David Gianechini and as Executrix of the Estate of Ernest Gianechini
Sessions, Fishman, Rosenson, Boisfontaine & Nathan
2500 Pan American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
Telephone: 504-581-5055

PROOF OF MAILING-AFFIDAVIT

I, Curtis R. Boisfontaine, one of the attorneys for Vera Gianechini, Individually and as Tutrix of the Estate of David Gianechini and as Executrix of the Estate of Ernest Gianechini, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 24th day of June, 1982, I ~~deposited~~ mailed in a classified post office branch located in ~~the Pan American Life Center, 601 Poydras Street,~~ New Orleans, Louisiana, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, the foregoing Jurisdictional Statement.

CURTIS R. BOISFONTAINE

Subscribed and sworn to before me, at New Orleans, Louisiana this _____ day of June, 1982.

NOTARY PUBLIC

APPENDIX A

Trial court's judgment and reasons for judgment

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 77-12107 DIVISION G DOCKET NO. 4

VERA GIANECHINI, Individually and as Tutrix of the Estate of DAVID GIANECHINI and as Executrix of the Estate of ERNEST GIANECHINI

VS

THE CITY OF NEW ORLEANS, ET AL

REASONS FOR JUDGMENT

Vera Gianechini, individually and as tutrix of the estate of David Gianechini and as the executrix of the estate of Ernest Gianechini, filed suit against the City of New Orleans and two firemen individually, namely Joseph Fricano and Arthur Turner.

A jury absolved the defendant firemen individually of any liability.

The liability of the City was tried simultaneously to

the Court and hence this opinion.

The Plaintiff contends that the City is liable for the negligence of its employees, Firemen Turner and Fricano, and it is independently negligent for its failure to supply, maintain, and properly equip its emergency vehicles. Additionally, the Plaintiff alleged that the City failed to properly select, train, and/or supervise the personnel assigned to the emergency vehicle which rendered assistance to Mr. Gianechini.

This Court held La. Rev. Statute R.S. 37:1732(B) unconstitutional. (See Reasons for Judgment issued herein on October 17, 1979). The effect of this judgment is to apply the ordinary principles of tort liability to the City.

On September 16, 1976, Ernest Gianechini was having dinner at the Andrew Jackson Restaurant in the French Quarter when he experienced a severe heart attack. He received immediate aid from a paramedic and a physician in the form of Cardiopulmonary Resusitation. Within minutes, the Fire Department emergency vehicle arrived, manned by the driver, Fireman Joseph Fricano, and Fireman Emergency Medical Technician Arthur Turner. Fireman Turner immediately assumed control of the situation and briefly administered oxygen from an Emerson Resusitator and began CPR. The victim was transferred from the restaurant to the emergency vehicle and rushed to Charity Hospital.

There is substantial dispute between the parties as to whether or not Fireman Turner and Fireman Fricano were negligent in the discharge of their duties to the decedent. This Court concludes that Firemen Turner and Fricano were not negligent in the administration of any CPR or negligent in the transportation services provided to the decedent.

The evidence does not support the conclusion that the City was negligent in the selecting, training and supervision of the personnel assigned to the emergency vehicle which responded to the Gianechini distress call.

However, the City was negligent for its failure to supply the proper equipment in its emergency vehicle which did respond.

In 1975 the national standards for emergency vehicle equipment were recognized by the State of Louisiana, Federal Regulations, and the American College of Surgeons. Equipment on emergency vehicles included hand operated-bag mask units (ambu units), portable suction units, portable oxygen units, and direct communication between the emergency vehicle and the hospital facility.

In this case the City's portable oxygen unit, for this emergency vehicle, was not operative and had been in a state of disrepair for a substantial period of time prior to Mr. Gianechini's heart attack. The City failed to provide a

substitute unit. The City did provide an Emerson Resusitator which was used in this case initially, which was ineffective and contra-indicated for use in cardiac arrest cases. The other equipment hereinabove referred to was never installed in the City's emergency vehicles.

However, the test set forth in *Dixie Drive-It-Yourself*, 242 La. 471, 137 So. 2d 298 (La. 1962) and in *Lejeune v Allstate Insurance Co.*, 365 So. 2d 471 (La. Sup. Ct. 1978), leads this Court to conclude that the City's negligence was not a substantial factor in causing the harm which was sustained by Ernest Gianechini.

Accordingly, there will be judgment in favor of the defendant, The City of New Orleans.

/S/Steven R. Plotkin

JUDGE

New Orleans, La.

January 10th, 1980.

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 77-12107 DIVISION G DOCKET NO. 4

VERA GIANECHINI, individually and as Tutrix of the Estate of David Gianechini and as Executrix of the Estate of Ernest Gianechini

vs

THE CITY OF NEW ORLEANS, ET AL

JUDGMENT

This cause was tried from October 15th through October 24th, 1979, and was submitted for adjudication.

Present: Robert E. Winn and J. David Forsyth, Attorneys for Plaintiffs

John P. Nelson, Jr., Ronald J. Favre and Laura P. Johnson, Attorneys for Defendant

The Court after hearing pleadings, evidence and argument of counsel, and for the written reasons filed herein and made part of the record,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the Defendant, The City of New Orleans, and against the Plaintiffs, Vera Gianechini, David Gianechini and Ernest Gianechini, dismissing said Plaintiffs' suit at Plaintiffs' costs.

JUDGMENT READ, RENDERED and SIGNED in Open Court, this 10th day of January, 1980.

/S/Steven R. Plotkin

JUDGE

APPENDIX B
Decision of Louisiana Court of Appeals
for the Fourth Circuit

VERA GIANECHINI, INDIVIDUALLY AND AS NATURAL TUTRIX OF THE MINOR CHILD DAVID GIANECHINI AND EXECUTRIX OF THE ESTATE OF ERNEST GIANECHINI	* NO. 12422 * COURT OF APPEAL * FOURTH CIRCUIT * STATE OF LOUISIANA

VERSUS

CITY OF NEW ORLEANS, NEW ORLEANS FIRE DEPARTMENT, ARTHUR TURNER, JOSEPH FRICANO, EARLY AMERICAN INSURANCE COMPANY AND XYZ INSURERS

****

APPEAL FROM THE CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
DIVISION "G"—NO. 77-12107
HONORABLE STEVEN R. PLOTKIN, JUDGE

****

JAMES C. GULOTTA
JUDGE

FEB. 09, 1982

***

(Court composed of Judges James C. Gulotta, William H. Byrnes, III and David R. M. Williams)

SESSIONS, FISHMAN, ROSENSON,
BOISFONTAINE & NATHAN
ROBERT E. WINN
J. DAVID FORSYTH
25th Floor, Pan American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
Attorneys for Plaintiff-Appellant

RONALD J. FAVRE
901 First N.B.C. Building
New Orleans, Louisiana 70112
Attorney for City of New Orleans &
New Orleans Fire Department

JOHN P. NELSON, JR.
1001 Howard Avenue, Suite 4304
New Orleans, Louisiana 70113
Attorney for Arthur Turner & Joseph Fricano
Defendants-Appellees

AFFIRMED

The surviving spouse and minor child of Ernest Gianechini appeal from the dismissal of their suit against the City of New Orleans and two individual firemen, Arthur Turner and Joseph Fricano, for negligence in rendering emergency assistance to Gianechini. We affirm.

Ernest Gianechini suffered a heart attack while dining with business associates at the Andrew Jackson

Restaurant on Royal Street in New Orleans at approximately 9:45 p.m. on September 16, 1976. Within seconds, a bystanding paramedic and another man, identified as a doctor, rushed to his aid. After determining he had no pulse and was not breathing, the two began to administer cardiopulmonary resuscitation (CPR) within forty-five seconds to one minute after the onset of the attack.

Within three to five minutes of Gianechini's initial distress, a New Orleans Fire Department emergency vehicle manned by defendants Turner and Fricano arrived on the scene. Turner administered oxygen to the victim for a few moments with an Emerson resuscitator[1] before resuming CPR using the mouth-to-mouth method. Gianechini was then placed on a stretcher and wheeled to the ambulance.

The emergency vehicle, driven by Fricano, arrived at the emergency room of Charity Hospital within ten minutes after the onset of the attack. During the three to five minute ride from the restaurant to the hospital, Gianechini was attended by fireman Turner, who continued to perform chest compressions, and James P. Murphy, a medically untrained associate of Gianechini, who administered oxygen mechanically through a mask at Turner's instructions.

---

[1] An Emerson resuscitator is a pressure-cycled device whereby oxygen is pumped into the victim's lungs and released once a certain preset pressure is reached. The Emerson resuscitator cannot be used to ventilate a victim's lungs during CPR because the chest compressions trigger the machine to release the air and adequate oxygen does not reach the victim's lungs.

At Charity Hospital, Gianechini's heartbeat was restored. It was subsequently determined, however, that although his heart attack had not been massive, he had suffered brain damage from lack of oxygen during the cardiac arrest. In April, 1977, he died from resulting medical complications.

Plaintiffs claim the decedent's brain damage and death were caused by the negligent acts or omissions of the two firemen at the restaurant and en route to Charity Hospital. They sought to prove that proper CPR had been administered by the two bystanders at the restaurant and that the firemen had failed to continue this life-saving technique properly. Plaintiffs seek recovery against the City based on respondeat superior and also under LSA-C.C. Art. 2317[2] and negligence theories because of the City's failure to staff its ambulance with properly trained personnel and to equip them with effective safety devices. Plaintiffs also complain that the trial judge erred in ordering a bifurcated jury trial on the liability of the firemen and a judge trial on the City's liability. They additionally complain of various errors during trial.

---

[2] LSA-C.C. Art. 2317 provides as follows:

"Art. 2317. Acts of others and of things in custody.

We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications."

BIFURCATED TRIAL

Over the objection of the plaintiffs, who had prayed for a jury determination of all issues as to all defendants, the trial judge conducted a "bifurcated" trial whereby the jury determined the liability of the individual firemen while the judge sat as trier of fact of the City's culpability. The trial judge based his ruling on LSA-R.S.13:5105, which provides: "No suit against the state or a state agency or political subdivision shall be tried by jury."

Plaintiffs, appealing, contend that LSA-R.S.13:5105 violates the equal protection provisions of the Louisiana and United States Constitutions and is an unconstitutional application of the doctrine of sovereign immunity, which was abolished by Article 12, §10 of the 1974 Louisiana Constitution. We disagree.

The validity of LSA-R.S.13:5105 has been upheld as a proper exercise of legislative authority to provide a "procedure" for suits against the state and its political subdivisions under LSA-Const. Art. 12, §10. *Jones v. City of Kenner*, 338 So.2d 606 (La. 1976); *Carter v. City of New Orleans*, 327 So.2d 488 (La. App. 4th Cir. 1976). Controlled by these cases, we reject plaintiffs' constitutional arguments. Accordingly, we conclude the trial judge properly "bifurcated" the trial and had the issues determined separately.

GROSS NEGLIGENCE STANDARD

Turner's liability as an emergency vehicle attendant was submitted for the jury's determination on a "gross negligence" standard, whereas Fricano's liability as driver of the vehicle was submitted on ordinary negligence. This disparity of standards arises from LSA-R.S.37:1732(A) and (C) which afford firemen "certified" in first aid training a limited immunity from liability for emergency medical assistance "...except for acts or omissions intentionally designed to harm or grossly negligent acts or omissions which result in harm" to the injured victim.[3] Undisputed evidence indicated that Turner had received certification as an Emergency Medical Technician (EMT), whereas Fricano had only received basic first aid training by the fire department and had no certification.

---

[3] LSA-R.S.37:1732(A) and (C) provide:

"A. Any fireman, policeman or member of an ambulance or rescue squad who holds a valid current certification by the American Red Cross, L.S.U. Fireman Training Rescue Program or United States Bureau of Mines, who renders emergency care, first aid or rescue while in the performance of his duties at the scene of an emergency, or moves a person receiving such care, first aid or rescue to a hospital or other place of medical care shall not be individually liable to such person for civil damages as a result of acts or omissions in rendering the emergency care, first aid, rescue or movement of such person receiving same to a hospital or other place of medical care except for acts or omissions intentionally designed to harm or grossly negligent acts or omissions which result in harm to such person, but nothing herein shall relieve the driver of an ambulance or other emergency or rescue vehicle from liability arising from the operation or use of such vehicle.

*****

C. In order for any fireman, policeman or member of an ambulance or rescue squad to receive the benefit of the exemption from civil

Although no issue is raised as to the standard of care applied to Fricano, plaintiffs contend that the "gross negligence" standard set forth in LSA-R.S.37:1732 should not be applied to Turner's behavior since the statute is unconstitutionally vague.

A statute violates due process if the language is so vague that men of common intelligence must guess at its meaning. *State v. Baker*, 359 So.2d 110 (La. 1978). We cannot say that LSA-R.S.37:1731 (sic) (A) and (c) are impermissibly ambiguous concerning certification requirements of firemen. In our case, it is clear that fireman Turner had received EMT training and while currently certified by the American Red Cross and the National Register of Emergency Technicians rendered "emergency care, first aid or rescue while in the performance of his duties at the scene of an emergency" and moved Gianechini "to a hospital or other place of medical care" as provided by the statute. Accordingly, we conclude that Turner clearly falls within the provisions of LSA-R.S.37:1732(A) and (C), and we find no merit to plaintiffs' argument based on statutory vagueness.

(Footnote 3 (C) continued)

liability provided for herein, he must first have taken and successfully completed the standard first aid course recognised or approved by the American Red Cross or the United States Bureau of Mines or the L.S.U. Fireman Training Rescue Program and further he shall have a valid certification from the Red Cross or the United States Bureau of Mines or the L.S.U. Fireman Training Rescue Program that he has successfully completed any necessary training or refresher courses, or shall have successfully completed a first aid course having standards at least equal to the standard first aid course recognized or approved by the American Red Cross or the United States Bureau of Mines or the L.S.U. Fireman Training Rescue Program."

CITY'S STANDARD OF CARE

In determining the City's liability, the trial judge employed an ordinary negligence standard and refused to apply LSA-R.S.37:1732(B) which by its terms would permit the City to benefit from the gross negligence standard applicable to its employee-fireman.[4] He declared that LSA-R.S.37:1732(B) was unconstitutional as violative of equal protection.

Because the trial judge concluded the negligence of the City "was not a substantial factor in causing the harm...", a determination with which we agree, the question whether the statutory gross negligence standard is applicable or unconstitutional is moot. Courts do not pass upon the constitutionality of a statute if the case can be decided on another ground. *State v. Stripling*, 354 So.2d 1297 (La. 1978).

---

[4] LSA-R.S.37:1732(B) provides:

"B. The immunity herein granted to a fireman, policeman or member of an ambulance or rescue squad in accordance with Subsection (A) of this section shall be personal to him and shall not inure to the benefit of any employer or other person legally responsible for the acts or omissions of such fireman, policeman or member of an ambulance or rescue squad nor shall it inure to the benefit of any insurer, except that no parish governing authority engaged in rendering ambulance services nor its insurer with respect to such ambulance services shall be liable for the act or omission of any member of any ambulance squad employed by it unless such individual would be personally liable therefor under the provisions of Subsection (A) hereof."

LIABILITY OF FIREMEN

At the outset, we need only briefly mention that the evidence overwhelmingly supported the jury's conclusion that fireman Fricano, the driver of the emergency vehicle, was not guilty of negligence in transporting Gianechini from the Andrew Jackson Restaurant to the Charity Hospital emergency room. It was undisputed that Fricano completed the trip in three to five minutes driving at the maximum speed that safety permitted. Furthermore, the weight of the evidence was that Fricano's failure to notify the hospital in advance of his arrival with the cardiac arrest victim had no discernable effect on the treatment he received in the emergency room.

A more difficult question for the jury, however, was determining whether fireman Turner, the emergency vehicle attendant, was grossly negligent in rendering improper CPR to Gianechini resulting in decedent's brain damage and death.

A factual dispute existed concerning the procedure used by Turner during the ambulance ride. According to Turner, he instructed the layman, Murphy, to hold an oxygen mask over Gianechini's nose and mouth and to administer oxygen at Turner's signal. The fireman testified that after every five chest compressions he nodded to Murphy to administer oxygen by depressing an Ohio demand valve and releasing it at a second nod of the head after Gianechini's lungs were inflated. Turner stated that at

least 36 times on the ride to the hospital he gave nodding signals to Murphy to depress the button and release it again.[5] According to expert witnesses, the method described by Turner would be an effective form of CPR.[6]

Murphy's testimony, on the other hand, was that Turner had simply handed him an oxygen mask in the ambulance, and told him to hold it over the victim's face and press the button. According to Murphy, he was never told to take pressure off the button at any time and was not given any kind of signal by Turner. Murphy stated that he held the mask over Gianechini's face and did not release the button unless he was wiping away vomitus on at least two or three occasions on the way to the hospital. If Murphy's version were believed, such CPR would probably not have been effective.

A second factual dispute concerned the physical con-

---

[5] When the button on the Ohio demand valve is pressed, oxygen is forced into the victim's lungs and when the button is released the flow of oxygen stops. This form of ventilation, unlike the Emerson resuscitator (see footnote 1, supra), can be used in CPR.

The emergency vehicle was equipped with a working Ohio demand valve connected to an oxygen source. Turner's trial testimony concerning use of the Ohio demand valve and the nodding signals in the ambulance differed from his earlier deposition where he did not mention switching from the Emerson to the Ohio.

---

[6] Plaintiffs medical expert, Dr. Edward Gober, stated that use of an untrained layman who pressed a button on a demand oxygen system at the nod of an EMT's head in connection with chest compressions would be an acceptable method of CPR if done correctly. Dr. Warren K. Carter, also called by plaintiffs, felt it was "perfectly fine" for an EMT to use lay help if properly observed.

dition of Gianechini in the minutes following his heart attack. According to medical testimony, the pupils of cardiac arrest victims dilate within one minute of arrest as the brain is deprived of oxygen. When the flow of oxygen is restored the pupils constrict or become smaller and react to light but they do not become "pinpointed" or very small and unreactive. According to the deposition of John T. Williams, the bystanding emergency medical technician who rendered emergency CPR in the restaurant before the arrival of the firemen, Gianechini's pupils began to dilate or get wider (a sign of cardiac arrest) within seconds after the onset of the attack, but the victim's color remained pink and his pupils constricted and remained "very small, pinpointed" after CPR began. When asked if his pupils reacted to the light, Williams testified that they "just remained constricted", a significant indication, according to this witness, that effective CPR was being administered. According to Turner, however, Gianechini's pupils were "pinpointed" and non-reactive to the light, representing possible brain damage.

Apart from these factual contradictions in the evidence, expert testimony concerning the effectiveness of CPR as a life-saving technique was also conflicting, based on statistical studies of survival rates of patients who had been administered CPR. Although plaintiff's experts estimated survival rates ranging from 70-95%, defendants' experts placed the rate as low as 15%.[7] Irrespective of the

[7] Dr. Arthur Wayne Owens, plaintiffs' expert in internal medicine, cardiology and CPR, testified that proper CPR instituted within one minute and continued until a hospital is reached results in a

differences in percentages, a reasonable inference from the testimony is that CPR is not a cure-all. Significantly, plaintiffs' medical experts acknowledged that properly perform-

---

(Footnote 7 continued)

survival rate of 70-80% on a national average, and approaches 95% of individuals with ventricular fibrillation. On cross-examination Dr. Owens acknowledged that the salvage rate in Seattle, which has a better emergency program than New Orleans, is initial out-of-hospital resuscitation of 40% of patients and discharge as long term survivors of 25%.

Dr. John Lownry (sic), Ph.D., an emergency medical service officer, testified that the survival rate is "pretty low". According to Lowry, studies of patients in 1974-76 responded to in three minutes or less indicated only 16% survived to discharge from the hospital, and of the survivors one-half had severe neurological deficits and had to be admitted to nursing homes.

Dr. Edward Gaber, plaintiffs' expert in internal medicine and CPR, stated that his personal success rate in reviving a person from cardiac arrest through CPR is "two out of three" and that the "current thinking" is a success rate up to 80% if CPR is within one minute of the onset of cardiac arrest and a better rate for ventricular fibrillation.

Dr. Warren K. Carter, an expert in emergency medicine testified that proper CPR administered to a man in Mr. Gianechini's condition would give him a "reasonably good chance for survival after advanced cardiac support at hospital."

Dr. Richard M. Paddison, defendants' expert neurologist, cited a 1979 study that showed a mortality rate of 73-80% of patients who suffered an out-of-hospital arrest and were comatose on arrival at the hospital.

Dr. Edward Howell, defendants' expert in emergency medicine, testified that a December, 1977 study of patients who went into ventricular fibrillation in front of a paramedic with all the equipment available showed only 43% survived. According to Howell, a Seattle study of 1975 showed only 40% of patients in ventricular fibrillation outside the hospital were initially resuscitated and only 25% were discharged as long-term survivors. He said that average success rates for out-of-hospital cardiac resuscitation from 1973-78 show 14.9% of persons survive to leave the hospital.

ed CPR is not always effective in preventing brain damage and death.[8]

Medical experts responded to hypothetical questions about the onset of the decedent's brain damage. Dr. Edward Gaber, plaintiffs' expert in internal medicine and CPR, was of the opinion that Gianechini's brain damage probably occurred during the ambulance ride, based on assumptions that he had received proper two-man CPR in the restaurant for five minutes, that his pupils had remained constricted and his color pink, and that he had only received chest compressions from Turner and oxygen from the Emerson resuscitator or from a demand valve used by his untrained friend during the ambulance ride. Significantly, however, Dr. Gaber acknowledged that he did not know Gianechini's skin color or the condition of his pupils upon arrival at Charity.[9] He testified that if those signs had been the same at Charity as when he had left the restaurant, he could not say at what point brain damage had started. Furthermore, this physician testified that the easy defribrillation of Gianechini at Charity Hospital indicated "something right" had been done, partially in the

---

[8] Dr. Arthur Owens testified that under the best of circumstances CPR is not always effective, and he had no opinion about the treatment administered to Gianechini.

Dr. Edward Gaber did not feel that all CPR, no matter how properly given, is always effective.

---

[9] There is no record of Gianechini's condition upon arrival at the emergency room of Charity Hospital.

ambulance, prior to his arrival at the hospital.

Dr. Robert Martinez, a neurologist called by plaintiffs, could not say, from an examination of the hospital records, at what point after the attack Gianechini had become brain damaged. Based on an assumption that he had received effective CPR in the restaurant and his pupils had been erroneously described by Williams as "pinpointed", he was of the opinion that the brain damage probably occurred after he had left the restaurant. Significantly, however, this physician also testified that to give a better opinion of when the brain became damaged it would be important for him to know what Gianechini looked like upon arrival at the Charity emergency room. Assuming the skin color, pupils and other signs were the same upon arrival at the hospital as at the restaurant, he acknowledged it could be concluded that brain damage could have occurred in the restaurant.

Defendants' experts were of the opinion that Gianechini had suffered brain damage at the restaurant before the firemen's arrival. Dr. Edward Howell, an expert in emergency medicine, felt that it was highly probable that Gianechini had aspiration at the restaurant whereby foreign materials went into his respiratory system sufficiently to prevent effective CPR. In his opinion, the victim's initial vomiting and regurgitation at the restaurant impeded effective CPR and caused difficulty in ventilating him and allowing oxygen to enter the lungs. He believed that Gianechini had demonstrated pulmonary

atelectasis or collapse, aspiration of gastric content, some pulmonary edema, and capillary profusion disorder, or a lung collapse whereby blood does not get oxygenated. He also felt that the finding of "pinpointed" pupils by Williams at the restaurant indicated that Gianechini had cerebral inoxia causing brain damage as pointed out in the autopsy. According to Dr. Howell, Gianechini's continuing regurgitation at the restaurant meant that excessive pressure was necessary to ventilate his lungs. Significantly this physician also testified that the treatment Gianechini received in the ambulance "was certainly not detrimental to the patient" since he was resuscitated without too much trouble after arrival at Charity Hospital.

Similarly, Dr. Richard A. Paddison, defendants' expert neurologist, was also of the opinion that Gianechini's brain damage had probably occurred before the firemen came to the restaurant and "in spite of" the CPR he received. This physician was of the opinion that something "catastrophic" had occurred in the victim's nervous system, including his brain and brain stem, taking into account the factors that he was comatose, unresponsive, not breathing on his own, and his pupils were "pinpointed" at the restaurant.

The defendants' case was also buttressed by the testimony of Lonnie M. Campbell, a paramedic accepted as an expert EMT, who was of the opinion that Gianechini's brain damage had occurred in the restaurant before the arrival of the firemen. This witness stated that even if proper

CPR had been started in the restaurant within one minute by two qualified people and continued until the patient was brought to Charity, he could not say he would have survived without permanent brain damage since he could have aspirated vomitus impairing his ability to get oxygen into his blood.

Considering the lay and expert testimony, we cannot say the jury erred in exonerating Turner from liability for Gianechini's brain damage and death. If Turner's testimony concerning use of the Ohio demand valve equipment and the head-nodding signals to Murphy during the ambulance ride, though disputed, is believed, the jury could have concluded that he performed proper CPR and there was no showing of any negligence, much less gross negligence. The undisputed medical testimony was that brain damage can occur even with proper CPR. In other words, the occurrence of brain damage does not necessarily mean improper CPR has been performed. Evidence that proper CPR was performed in the restaurant and that Gianechini arrived at Charity Hospital with brain damage does not establish that Turner did not administer proper CPR or that his treatment in the ambulance caused the brain damage.

In short, the plaintiffs simply failed to show that Turner had performed improper CPR that was a cause in fact of the victim's brain damage. This conclusion finds support in defendants' expert medical testimony, although disputed by plaintiffs' experts, that Gianechini very well

could have suffered irreversible brain damage at the restaurant despite Williams' efforts and proper CPR even before the firemen arrived on the scene. The evidence supports the jury's conclusion that Turner was not "grossly negligent."

CITY'S LIABILITY

Although it is true, as pointed out by the trial judge, that the emergency vehicle manned by Turner and Fricano failed to meet the accepted standards for emergency vehicle equipment by its lack of a hand operated bag-mask unit, portable suction unit, portable oxygen unit, we find no error in that trial judge's further conclusion that "...the City's negligence was not a substantial factor in causing the harm which was sustained by Ernest Gianechini." We cannot conclude the record supports a finding that brain damage occurred after the arrival of the firemen and that improper CPR was administered because of lack of equipment.

Although Turner had no portable aspirator or portable demand oxygen equipment for use in the restaurant and in transporting Gianechini to and from the emergency vehicle, the evidence, though conflicting, does not indicate that CPR was interrupted for more than 15 seconds, the accepted maximum time of interrupting CPR in transporting the victim, or that the overall effectiveness of the CPR actually performed was diminished significantly. Moreover, if Turner's version of the events is accepted as true, his

limited use of the Emerson resuscitator was not detrimental. Accordingly, we conclude that no showing was made that the faulty or missing equipment was a cause-in-fact of the brain damage.

TRIAL ERRORS

As grounds for reversal, plaintiffs also cite certain alleged errors or improprieties occurring at trial. We find no merit to these contentions.

Plaintiffs argue that the trial judge erred in withholding from the jury the City's obligation to pay any judgment rendered against the individual defendants Turner and Fricano, while permitting, over plaintiffs objection, evidence of the firemen's limited financial ability to respond in judgment. This argument is addressed to quantum. Because the firemen and the City were exonerated from liability, no necessity exists to consider this alleged trial error.

During trial, the judge interrupted the questioning of one of plaintiffs' medical experts and stated that he could not give his opinion in response to a hypothetical question unless he could do so "to a reasonable medical certainty" rather than on a "probability standard." Later in the trial, the judge denied plaintiffs request for mistrial, and told the jury to disregard his previous comment concerning "reasonable medical certainty". He further instructed the jury that the causal relationship between the

injury and the brain damage could be considered "as a medical certainty, a more reasonable than not, probable than not, or a reasonable probability." Furthermore, the court clarified the degree of proof in his final charge to the jury. Although plaintiffs argue that the effect of the judge's error concerning the degree of proof of medical causation was "devasting", we conclude, considering the record as a whole, that any initial prejudice was removed by the trial court's corrective instructions and final charge to the jury. Under these circumstances, we find no reversible error. Accordingly, we reject plaintiffs' contention that the jury's findings are not entitled to the benefit of the manifest error rule.

We likewise are not persuaded by plaintiffs' arguments concerning the trial judge's charge to the jury on the issue of proximate cause. The judge described proximate cause as one "without which the accident could not have happened" and referred to it as the "procuring, efficient or predominant cause". Plaintiffs contend the judge's explanation was erroneous since proximate causation need not be *the* predominant causation but only *a* "substantial factor" in causing the injury. Although the trial court's charge to the jury may not have been couched in the precise terms preferred by plaintiffs, we cannot say that the court's language was so confusing or misleading as to constitute reversible error. Moreover, in the written interrogatories, the jurors were asked if Turner's gross negligence or Fricano's negligence was "a proximate cause or a substantially contributing factor producing Mr.

Gianechini's death." Accordingly, any error in the trial judge's charge concerning causation was harmless.

As a final ground for reversal, plaintiff contends that a mistrial should have been granted when counsel for defendant, during his closing arguments to the jury, stated, in effect, that a verdict for plaintiffs "end emergency service in New Orleans". Although this statement was obviously improper, we find no error in the trial judge's denial of the motion for a mistrial. Upon plaintiffs' immediate objection to the comment, the judge instructed the jury to disregard the remark. Any prejudice in the jury's mind was thereby dispelled.

Accordingly, the judgments are affirmed.

AFFIRMED

APPENDIX C

DENIAL OF THE WRIT OF REVIEW BY THE LOUISIANA SUPREME COURT

THE SUPREME COURT OF THE
STATE OF LOUISIANA

VERA GIANECHINI, INDIVIDUALLY
AND AS NATURAL TUTRIX OF THE MINOR
CHILD DAVID GIANECHINI AND
EXECUTRIX OF THE ESTATE OF
ERNEST GIANECHINI

VERSUS No. 82-C-0596

CITY OF NEW ORLEANS, NEW ORLEANS
FIRE DEPARTMENT, ARTHUR TURNER,
JOSEPH FRICANO, EARLY AMERICAN
INSURANCE COMPANY AND XYZ INSURANCE

Re: Vera Gianechini, Individually and as Tutrix of the Estate of David Gianechini and as Executrix of the Estate of Ernest Gianechini, applying for Certiorari, or Writ of Review, to the Court of Appeal Fourth Circuit, Parish of Orleans, Number 12,422.

March 26, 1982

Denied.

JAD

PFC

WFM

JLD

FAB

JCW

HTL

Supreme Court of Louisiana
March 26, 1982

/S/FRANS J. LABRANCHE, JR.
Clerk of Court
For the Court

APPENDIX D
Notice of Appeal to the United States Supreme Court

SUPREME COURT OF LOUISIANA

NO. 82-C-0596

(Fourth Circuit No. 12,422)
(CDC No. 77-12107)

VERA GIANECHINI, INDIVIDUALLY AND AS TUTRIX OF THE ESTATE OF DAVID GIANECHINI AND AS EXECUTRIX OF THE ESTATE OF ERNEST GIANECHINI

Plaintiff-Appellant

versus

CITY OF NEW ORLEANS, NEW ORLEANS FIRE DEPARTMENT, ARTHUR TURNER, JOSEPH FRICANO, EARLY AMERICAN INSURANCE COMPANY AND X, Y, AND Z INSURERS

Defendants-Appellees

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that plaintiff-appellant, Vera Gianechini, individually and as tutrix of the estate of David Gianechini and as Executrix of the estate of Ernest Gianechini, hereby appeals from the judgment entered on March 26, 1982 of the Louisiana Supreme Court (82-C-0596) denying her petition for writ of review to the Louisiana Court of Appeal, Fourth Circuit, Parish of Orleans, No. 12,422, insofar as said denial upholds the denial to plaintiff-appellant of the right to a trial by jury of the personal injury and death claims against the City of New Orleans, State of Louisiana, pursuant to Louisiana Revised Statute 13:5105. No application for rehearing is permitted by Louisiana law. This appeal is taken pursuant to 28 U.S.C. 1257(2).

Sessions, Fishman, Rosenson,
Boisfontaine & Nathan
Robert E. Winn (Trial Attorney)
2500 Pan American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
Telephone: 504-581-5055

By /S/ROBERT E. WINN
ROBERT E. WINN
ATTORNEYS FOR PLAINTIFF-APPELLANT

CERTIFICATE OF SERVICE

I certify that a copy of the above notice of appeal to the United States Supreme Court has been served on all parties required to be served by depositing same in a United States mailbox, with first class postage prepaid, addressed to counsel of record of all parties required to be served at their post office addresses and upon the Attorney General of the State of Louisiana on the 9th day of June, 1982. Service has been made upon:

City of New Orleans
Through City Attorney's Office
City Hall
New Orleans, Louisiana 70112

Ronald J. Favre, Esq.
901 First N.B.C. Building
New Orleans, Louisiana 70112

Arthur Turner and Joseph Fricano
through John P. Nelson, Jr., Esq.
1001 Howard Avenue
Suite 4304
New Orleans, Louisiana 70113

Louisiana Attorney General
William J. Guste, Jr.
State Capitol
P.O. Box 44005
Baton Rouge, Louisiana 70804

/S/ROBERT E. WINN
ROBERT E. WINN

APPENDIX E

Judgment dismissing insurance company

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 77-12107 DIVISION "G" DOCKET NO. 4

VERA GIANECHINI, INDIVIDUALLY, AND AS TUTRIX OF THE ESTATE OF DAVID GIANECHINI AND AS EXECUTRIX OF THE ESTATE OF ERNEST GIANECHINI

VS.

CITY OF NEW ORLEANS, ET AL

FILED:_____ _____
DEPUTY CLERK

JUDGMENT

This cause came on for hearing on this date on a Motion for Summary Judgment filed on behalf of the defendant, Early American Insurance Company. Present: Frederick S. Haygood for mover, Early American Insurance Company; For respondent, Vera Gianechini, et al—unopposed.

The Court having heard the pleadings, evidence and arguments of counsel, and considering the law and

evidence to be in favor of the defendant mover for the reasons orally assigned,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the defendant and mover, Early American Insurance Company, and against the plaintiff and respondent, Vera Gianechini, et al, granting the Motion for Summary Judgment and dismissing this action as to the defendant mover, Early American Insurance Company only, and reserving unto plaintiff all rights against the remaining defendants herein.

JUDGMENT READ, RENDERED AND SIGNED on this 13th day of January, 1978, at New Orleans, Louisiana.

/S/PAUL P. GAROFALO

DISTRICT JUDGE

Office - Supreme Court, U.S.
FILED
AUG 20 1982
ALEXANDER L. STEVAS,
CLERK

Number 81-2377

In The
Supreme Court of the United States

OCTOBER TERM, 1981

VERA GIANECHINI, INDIVIDUALLY AND AS TUTRIX OF THE ESTATE OF DAVID GIANECHINI AND AS EXECUTRIX OF THE ESTATE OF EARNEST GIANECHINI,
Plaintiff-appellant,

VERSUS

CITY OF NEW ORLEANS, NEW ORLEANS FIRE DEPARTMENT, ARTHUR TURNER, JOSEPH FRICANO, EARLY AMERICAN INSURANCE COMPANY, AND X, Y, AND Z INSURERS,
Defendants-appellees.

On Appeal from the
Supreme Court of Louisiana

MOTION TO DISMISS

WILLIAM J. GUSTE, JR.
Attorney General
THOMAS S. HALLIGAN
Assistant Attorney General
CHARLES L. PATIN, JR.
Assistant Attorney General
Chief, Civil Division
Department of Justice
Post Office Box 44005,
Capitol Station
Baton Rouge, Louisiana 70804
Telephone (504) 342-7013

TABLE OF CONTENTS

Page

Table of Authorities ii

Statement of the Case 2

Summary of Argument 3

Insubstantial Federal Question 3

The Judgment of the Lower Court Rests on Non-Federal Grounds 9

Other Grounds 10

Conclusion 11

TABLE OF AUTHORITIES

Page

Cases:

1. *Melancon v. McKeithen*, 345 F. Supp. 1025 (U.S.D.C., E.D., La., 1972) affd. sub. non. *Mayers v. Ellis*, 409 U.S. 945, 93 S.Ct. 289, 34 L.Ed.2d 214 (1972) 3, 7
2. *Edwards v. Elliot*, 21 Wall. 532, 88 U.S. 532, 22 L.Ed. 487 (1874) 4
3. *Walker v. Sauvinet*, 92 U.S. 90, 23 L.Ed. 678 (1876) 4
4. *Chicago R.I. & P.R.R. Co. v. Cole*, 251 U.S. 54, 40 S.Ct. 68, 64 L.Ed. 133 (1919) 4
5. *Mutual Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 54 S.Ct. 69, 76 L.Ed. 214 (1931); Anno., 18 L.Ed. 2d 1388, 1410-1412 4
6. *Hill v. U.S.*, 453 F.2d 839 (6th Cir., 1972) 4
7. *Board of Commissioners of the Port of New Orleans v. Splendour Shipping & Enterprises Co.*, 273So.2d 19 (La. 1973) 6
8. *Skrbina v. Pennsylvania Dept. of Highways*, 468 F. Supp. 215 (U.S.D.C., PA, 1979) 6

Constitutions, Statutes:

1. United States Constitution:
   Fourteenth Amendment 3
   Seventh Amendment 4
2. Louisiana Constitution of 1974
   Article 12, Section 10 5
3. La. Rev. Stat. Ann. 13:5105
   (West Supp. 1982) 5

Number 81-2377

In The Supreme Court of the United States

OCTOBER TERM, 1981

VERA GIANECHINI, INDIVIDUALLY AND AS TUTRIX OF THE ESTATE OF DAVID GIANECHINI AND AS EXECUTRIX OF THE ESTATE OF EARNEST GIANECHINI,
Plaintiff-appellant,

VERSUS

CITY OF NEW ORLEANS, NEW ORLEANS FIRE DEPARTMENT, ARTHUR TURNER, JOSEPH FRICANO, EARLY AMERICAN INSURANCE COMPANY, AND X, Y, AND Z INSURERS,
Defendants-appellees.

On Appeal from the Supreme Court of Louisiana

MOTION TO DISMISS

MAY IT PLEASE THE COURT:

On behalf of the City of New Orleans, the defendant-appellee against which plaintiff-appellant has taken this appeal, the Attorney General of Louisiana, through his undersigned assistant(s), hereby moves to dismiss the appeal taken to this Honorable Court in this case for the reasons set forth hereinbelow:

STATEMENT OF THE CASE

Without an acceptance of the veracity or accuracy of the factual allegations that form plaintiff-appellant's cause of action on the merits of her suit in tort, plaintiff-appellant's Statement of the Case, as it appears in her Jurisdictional Statement, is accepted here for its general descriptive quality for the limited purpose of this Motion to Dismiss, except as follows:

Plaintiff-appellant's Statement of the Case appears to indicate that her trial by jury against the two firemen was merely on an intentional act/gross negligence standard. However, the trial attorney for defendant-appellee city advises that the jury tried the case by special interrogatories, that the jury considered not only the alleged gross negligence of the "Good Samaritan" fireman but also his simple negligence as well (to guide the judge in imputing simple negligence to the city under the doctrine of *respondeat superior*), and that the jury found no negligence, either simple or gross. [Perhaps it should be noted that such a procedure concerning *respondeat superior* liability does not properly follow the true Louisiana practice on bifurcated trials; nevertheless, the fact that the jury did, in this case, pass on the simple negligence issue as well as the gross negligence issue and found no negligence at all is certainly relevant to, and actually militates against, the substantiality of this appeal.]

SUMMARY OF ARGUMENT

The appeal should be dismissed because it lacks a substantial federal question, because the judgment below rests on non-federal grounds, and because, for comity and reasons of balancing good cases offering good results against bad cases on the facts offering bad results, this case should be dismissed from an already overcrowded docket.

INSUBSTANTIAL FEDERAL QUESTION

Plaintiff-appellant's appeal ought to be dismissed because it fails to raise a substantial federal question.

Insofar as there may be a federal question asserted, it is insubstantial because the Fourteenth Amendment to the Constitution of the United States does not require states to provide jury trials in civil cases such as this one.

In a well-reasoned, exhaustive opinion on this subject, Judge Wisdom of the Fifth Circuit concluded, for the majority of a three-judge court, that a civil jury trial (especially the old Common Law type of civil jury) is not so implicit in the concept of ordered liberty in a cooperative federalism as to be required of the states by the Fourteenth Amendment. *Melancon v. McKeithen*, 345 F.Supp 1025 (U.S.D.C., E.D., LA, 1972) affirmed by this Honorable Court sub nom. *Mayes v. Ellis*, 409 U.S. 943, 93 S.Ct. 289, 34 L.Ed. 2d 214 (1972).

It has been consistently held that the Seventh Amendment provision regarding civil jury trials in Common Law cases is not applicable to the states through the Fourteenth Amendment. See, for example,

Edwards v. Elliot, 21 Wall. 532, 88 U.S. 532, 22 L.Ed. 487 (1874); *Walker v. Sauvinet*, 92 U.S.90, 23 L.Ed. 678 (1876); *Chicago, R.I. & P.R.R. Co. v. Cole*, 251 U.S. 54, 40 S.Ct. 68, 64 L.Ed. 133 (1919); *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 52 S.Ct. 69, 76 L.Ed. 214 (1931); Anno., 18 L.Ed.2d 1388, 1410-1412; and *Mayes v. Ellis*, supra.

Even the Seventh Amendment itself recognizes the difference between those civil cases arising under Common Law and those that do not. And it is submitted that Common Law never included civil cases for damages brought against the sovereign. Thus, cases brought against the sovereign by virtue of the sovereign's waiver of immunity do not really arise under the Common Law but rather by special fiat of the sovereign and only under such terms and conditions as the sovereign may have chosen to waive such immunity. See, for example, *Hill v. U.S.*, 453 F.2d 839 (6th Cir., 1972) and also all the cases against the United States of America under the Federal Tort Claims Act.

Here, it must be emphasized that we are speaking not of the peculiarities of Eleventh Amendment immunity, federalism, and the jurisdiction of Congressionally created lower federal courts. Rather, the issue raised on this appeal involves the state sovereignty that applies to the state and its agencies and subdivisions under state law and considered in cases where suit takes place in *state* court. It is the age-old sovereign immunity that applies to a state and its agencies and subdivisions to prevent them from being sued in their own *state* court (i.e., determining state court jurisdiction) without the sovereign's consent.

Louisiana's waiver of sovereign immunity is like that in *Hill* and other cases, supra, *conditional*. It is conditioned on, inter alia, non-seizure of public funds and property, availability of funds and legislative appropriations therefor, and also upon the legislature's power to enact procedural terms and conditions. Such are the terms spelled out by Article 12, Section 10, of the 1974 Louisiana Constitution, particularly in subsection "C" thereof as follows:

> § 10 Suits Against the State
>
> Section 10. (A) No Immunity in Contract and Tort. Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.
>
> (B) Waiver in Other Suits. The legislature may authorize other suits against the state, a state agency, or a political subdivision. A measure authorizing suit shall waive immunity from suit and liability.
>
> (C) Procedure; Judgments. The legislature shall provide a procedure for suits against the state, a state agency, or a political subdivision. It shall provide for the effect of a judgment, but no public property or public funds shall be subject to seizure. No judgment against the state, a state agency, or a political subdivision shall be exigible, payable, or paid except from funds appropriated therefor by the legislature or by the political subdivision against which judgment is rendered.

Pursuant to such distribution of powers, the legislature enacted R.S. 13:5105, prohibiting jury trials against the state, as one of the procedural terms and conditions given in return for the waiver of sovereign immunity.

This Honorable Court should not be misled by the citing of *Board of Commissioners of the Port of New Orleans v. Splendour Shipping & Enterprises Co.*, 273 So.2d 19 (LA, 1973). It is true that the Supreme Court of Louisiana, relying solely on the authority that sovereign immunity had, up to then, been only judicially created, abolished same also judicially in *Splendour*. However, the 1974 Constitution came subsequent to the *Splendour* case and supersedes *Splendour* to become the *one* existing authority on the manner of waiver of sovereign immunity. See *Skrbina v. Penna Dept. of Highways*, 468 F.Supp. 215 (U.S.D.C., PA, 1979).

There is nothing in the Constitution of the United States that prohibits a state and its agencies and subdivisions from enjoying sovereign immunity in such state's own courts. Likewise, there is nothing prohibiting a *conditional* waiver of that sovereign immunity (conditioned procedurally, among other things, on a trial by judge).

In this regard, it should be emphasized that plaintiff-appellant could have attempted to have the legislature grant her a special act of waiver containing a provision allowing a jury trial. Plaintiff-appellant, however, proceeded to take advantage of the general, but conditional, waiver as contained in Article 12, Section 10, of the 1974 Louisiana Constitution. Having relied on such conditional waiver to bring her suit, she should not now be able to complain about the terms and conditions of the very same waiver that she invoked and took advantage of.

The condition of the judge trial for a waiver of im-

munity is reasonable not only in light of the civil judge-versus-jury revelations contained in *Melancon v. McKeithen*, supra, but also in light of the peculiar status of the state, its agencies and its subdivisions, readily distinguishing them from the class of private persons. A private person does not exist solely for the common good of the whole society and body politic. If a private business corporation, for example, making ingots is sued civilly, found liable, and has its property or funds seized to pay the judgment, society simply may have fewer ingots on the market, and unemployment may be slightly higher. However, if the same thing happened to the city, for example, and society lost police and fire protection altogether or public health and hospital services, anarchy could and would result. Moreover a private person does not own or run jails or prisons and is not sued every day by inmates more than half of whose suits, though presenting colorable claims, are frivolous, cumulatively repetitious, and in forma pauperis. Having jury trials against a sovereign would mean not only a devastating waste and drain of the sovereign's resources providing jury trial after jury trial on such prisoner's suits but also a log jam in the state's civil court system that could never be unclogged. Thus, there is ample distinction—in history, in the Seventh Amendment and Fourteenth Amendment themselves (as interpreted by *Melancon v. McKeithen*, supra, and other cases), and in reality and practicality—for the sovereign (the state and its agencies and subdivisions) to waive sovereign immunity from suit in its own state court system reasonably upon the condition that the civil procedure used will be a judge trial.

Furthermore, all litigants who bring suit under Article 12, Section 10, of the 1974 Louisiana Constitution are faced with the same legal provisions and conditions. There is no distinction built into the law in that regard.

Despite plaintiff-appellant's assertion to the contrary, the treatment of claims against the United States on the federal level in the federal government's own system is analogous to the treatment of claims against a state and its agencies and subdivisions on the state level in the state's own court system. And as the former provides no trial by jury, so can the latter.

There is no substantial federal question here, therefore, in law.

Additionally, there is no substantial question raised on this particular appeal because of the facts and posture of the case itself as it comes to this court.

Even plaintiff-appellant herself admits in her Jurisdictional Statement,

> "No question is raised here as to the propriety of the jury's verdict dismissing the action against the firemen. Nor is there any appeal on the merits of the trial judge's decision on the City's liability." Jurisdictional Statement p. 5.

It is submitted that if there is no appeal, no error cited, on the outcome of the merits of her case, this appeal is insubstantial. If it does not make any difference—judge procedure or jury procedure—as to how a true and just verdict and judgment is rendered, then the complaint about the procedure used falls away. It is hardly reasonable to argue that one has a constitutional right to a

particular procedure (a jury trial) on the grounds and motivation that one might be able to arrive using sympathy or whatever, at an objectively unjust (though personally favorable) result different in outcome from the true and just result obtained from the complained-of procedure used (judge trial or at least bifurcated trial). It is submitted that nothing in the Constitution of the United States either means or intends to secure a right to an unjust, though personally favorable, judgment.

Plaintiff-appellant also argues that jury trials result in different verdicts than judge trials. Although she admits that it cannot be demonstrated, she indicates it is the common experience of the bar. However, in this very case, the jury, by special interrogatories passed not only on gross negligence but also the simple negligence of both of the firemen for purposes of *respondeat superior* liability on the city herein and found there to be no negligence at all. The only finder of any negligence was the judge! However, he properly ruled that such independent omission of the city did not cause the harm complained of.

THE JUDGEMENT OF THE LOWER COURT RESTS ON THE NON-FEDERAL GROUNDS

This appeal should be dismissed because the judgment of the lower court rests on the non-federal grounds. For these same reasons stated above—the jury's finding no simple negligence as to either fireman, the non-appeal herein on the merits of the outcome of the case below under state tort law, and the like—the final judgment in this case obviously rests on non-federal grounds.

OTHER GROUNDS

This appeal should be dismissed also because of federal comity, as a very sensitive *state* question concerning the terms and conditions under which the *state* has waived its sovereign immunity from suit *in its own state courts* is raised on this appeal, not really a federal question. As shown hereinabove, the facts and posture of this case militate against the substantiality of the issue raised because the jury in this case denied plaintiff-appellant recovery anyway, and not much good, but a lot of harm, could be done, as a pratical matter, in entertaining this particular case on an already overcrowded docket containing cases much more worthy of this Honorable Court's precious time, study, and analysis.

CONCLUSION

For the above reasons, plaintiff-appellant's appeal should be dismissed.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
Attorney General

/s/ Thomas S. Halligan

THOMAS S. HALLIGAN
Assistant Attorney General

/s/ Charles L. Patin, Jr.

CHARLES L. PATIN, JR.
Assistant Attorney General
Chief, Civil Division

PROOF OF SERVICE
CERTIFICATE BY BAR MEMBER

I, _____, one of the attorneys for the City of New Orleans, appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of August, 1982, I served copies of the foregoing Motion to Dismiss on:

1. The City of New Orleans, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, through City Attorney's Office, City Hall, New Orleans, Louisiana 70112.

2. The defendants, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

To Ronald J. Favre, Esquire
Attorney for City of New Orleans
901 First N.B.C. Building
New Orleans, Louisiana 70122

To John P. Nelson, Jr., Esquire
Attorney for Arthur Turner and
Joseph Fricano
1001 Howard Avenue
Suite 4304
New Orleans, Louisiana 70113

3. Curtis R. Boisfontaine, attorney for plaintiff/appellant Vera Gianechini, Sessions, Fishman, Rosenson, Boisfontaine & Nathan, 2500 Pan American Life, 601 Poydras Street, New Orleans, Louisiana 70130.

B-7561, 50, 8-82

NO. 81-2377

Office - Supreme Court U.S.
FILED
SEP 17 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

VERA GIANECHINI, INDIVIDUALLY AND AS TUTRIX OF THE ESTATE OF DAVID GIANECHINI AND AS EXECUTRIX OF THE ESTATE OF ERNEST GIANECHINI

Appellants,

versus

CITY OF NEW ORLEANS, NEW ORLEANS FIRE DEPARTMENT, ARTHUR TURNER, JOSEPH FRICANO, EARLY AMERICAN INSURANCE COMPANY AND X,Y, AND Z INSURERS

Appellees.

ON APPEAL FROM THE LOUISIANA SUPREME COURT

BRIEF BY PLAINTIFF-APPELLANT IN OPPOSITION TO MOTION TO DISMISS

Sessions, Fishman, Rosenson,
Boisfontaine & Nathan
Robert E. Winn (Trial Attorney)
J. David Forsyth
2500 Pan American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 581-5055

TABLE OF CONTENTS

Page

I. The Jury Never Considered the City's Respondeat Superior Liability For Turner's Actions Under the Pertinent Legal Standard 2

II. A Substantial Federal Question is Presented 3

III. Conclusion 5

TABLE OF AUTHORITIES

Cases:

Gianechini v. City of New Orleans, 410 So.2d 292 (La. App. 4th Cir. 1982) 2

Melancon v. McKeithen, 345 F.Supp. 1025 (E.D. La. 1972), aff'd, *sub nom Mayes v. Ellis*, 409 U.S. 943, 93 S. Ct. 289 (1972) 3, 4

Constitutions, statutes:

United States Constitution:

Seventh Amendment 4

Fourteenth Amendment 3

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-2377

VERA GIANECHINI, INDIVIDUALLY AND AS TUTRIX OF THE ESTATE OF DAVID GIANECHINI AND AS EXECUTRIX OF THE ESTATE OF ERNEST GIANECHINI

versus

CITY OF NEW ORLEANS, NEW ORLEANS FIRE DEPARTMENT, ARTHUR TURNER, JOSEPH FRICANO, EARLY AMERICAN INSURANCE COMPANY AND X, Y, AND Z INSURERS

ON APPEAL FROM THE LOUISIANA SUPREME COURT

BRIEF BY PLAINTIFF-APPELLANT IN OPPOSITION TO MOTION TO DISMISS

MAY IT PLEASE THE COURT:

This Brief is respectfully submitted on behalf of Plaintiff-Appellant, Vera Gianechini, individually and as tutrix of the estate of David Gianechini and as executrix of the estate of Ernest Gianechini (hereinafter "Appellant") in opposition to the Motion to Dismiss recently filed on behalf of the Attorney General of the State of Louisiana.* It is intended to point out one serious misstatement of fact and one material misinterpretation of law presented

---

* The City of New Orleans, and not the State of Louisiana, was a defendant below. No opposition or motion has been filed by it.

by that Motion. In all other respects the Court's attention is invited to Appellant's Jurisdictional Statement.

1. *THE JURY NEVER CONSIDERED THE CITY'S RESPONDEAT SUPERIOR LIABILITY FOR TURNER'S ACTIONS UNDER THE PERTINENT LEGAL STANDARD*

In its Statement of the Case, the Attorney General erroneously suggests that the jury decided the case against both of the individual defendants (Turner and Fricano) on "simple negligence" principles and not merely under a "gross negligence" standard. This is an incorrect factual statement. Although the jury considered the liability of Fricano, who was merely the driver of the ambulance and whose role was very limited, under a simple negligence theory, it determined the liability of Turner, who actively handled and was responsible for the care of the deceased, based only upon a gross negligence standard, as was recognized by the February 9, 1982 opinion of Louisiana's Fourth Circuit Court of Appeal, 410 So.2d 292, 295-96 (La. App. 4th Cir. 1982), p. A-12 of Appellant's Jurisdictional Statement.

Thus, the Attorney General makes an incorrect statement regarding the standard of liability considered by the jury as to the individual defendants. This misstatement is crucial because the question of Turner's liability under a simple negligence standard, which the trial judge had to consider in connection with the City's *respondeat superior* liability, was never considered by the jury. Thus, the error committed below in not affording to Appellant the right to a jury trial against the City (which would have involved a consideration of Turner's liability under a simple negligence standard) was substantial and not merely harmless.

II. *A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED*

In suggesting that Appellant's Jurisdictional Statement fails to raise a substantial federal question, the Attorney General relies primarily upon the decision of Judge Wisdom of the Fifth Circuit, as organ for a three judge court, in *Melancon v. McKeithen*, 345 F. Supp. 1025 (E.D. La. 1972), *affirmed, sub nom, Mayes v. Ellis*, 409 U.S. 943, 92 S. Ct. 289 (1972). Reliance on that decision is misplaced, however. Indeed, to the extent that that decision is applicable, it supports Appellant's position and establishes that the issue raised by Appellant presents a substantial federal question.

Melancon reached the Fifth Circuit in a series of consolidated cases, all raising the question of whether the Seventh Amendment to the United States Constitution applied to civil actions in Louisiana courts, through the due process clause of the Fourteenth Amendment, so as to preclude appellate review of facts in jury cases. The factual situations involved in those decisions are set forth at Appendix A to Judge Wisdom's decision, 345 F. Supp. 1025, 1048-1050. None of those situations related to the issue raised in this appeal, namely whether the State of Louisiana's proscription against jury trials against a sovereign offends the Due Process or Equal Protection clauses of the Fourteenth Amendment to the United States Constitution.

However, it is highly significant that the threshold issue addressed by the *Melancon* court was whether a three judge court was properly convened to consider the challenge there raised. The defendants had contended that a three judge court should not have been convened because "no substantial federal question exists requiring the case to be heard by a three-judge court". *Id.*, 345 F. Supp. at 1030. In *rejecting* that argument, Judge Wisdom noted the "in-

creasing willingness" of the courts, in light of recent Supreme Court cases, "to re-examine the old precedents" with respect to "an evolving standard of due process". Thus, Judge Wisdom wrote that:

> "we conclude that at this point in our constitutional history a substantial federal question exists here; we must reassess the requirements of due process with respect to jury trials and the review of jury findings in state civil proceedings."
> *Id.*

Although that Court found that the Seventh Amendment did not prevent appellate review of jury findings in civil trials, it did not meet or address the monumental issue presented here, whether the prohibition against jury trials against the state must fall, not only under due process standards, but under equal protection analysis as well. Certainly the questions presented here are far more substantial than those raised in *Melancon*. Indeed, in affirming Judge Wisdom's decision, *Mayes v. Ellis*, 409 U.S. 943, 93 S. Ct. 289, (1972), this Court made an implicit finding that a substantial federal question existed in that case. Even more-so should it reach the same conclusion here.

III. *CONCLUSION*

In view of the manifest unfairness and clear unconstitutionality of La.Rev.Stat.Ann. §13:5105 denying Mrs. Gianechini a right to jury trial, the Motion to Dismiss should be denied and probable jurisdiction should be noted, for the reasons set forth above and for the reasons expressed in Appellant's Jurisdictional Statement.

Respectfully submitted,

Sessions, Fishman, Rosenson,
Boisfontaine & Nathan
Robert E. Winn (Trial Attorney)
J. David Forsyth
2500 Pan American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 581-5055

BY: _____

ROBERT E. WINN

Attorneys for Vera Gianechini, Individually and as Tutrix of the Estate of David Gianechini and as Executrix of the Estate of Ernest Gianechini

PROOF OF SERVICE-CERTIFICATE BY BAR MEMBER

I, Robert E. Winn, one of the attorneys for Vera Gianechini, Individually and as Tutrix of the Estate of David Gianechini and as Executrix of the Estate of Ernest Gianechini, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 3rd day of September, 1982, I served copies of the foregoing Brief By Appellant in Opposition to Motion to Dismiss on the several parties thereto, as follows:

1. On the City of New Orleans, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, through the City Attorney's office, City Hall, New Orleans, Louisiana 70112.

2. On defendants, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

To Ronald J. Favre, Esq., Attorney for City of New Orleans, 901 First NBC Building, New Orleans, Louisiana 70112

To John P. Nelson, Jr., Esq., Attorney for Arthur Turner and Joseph Fricano, 1001 Howard Avenue, Suite 4304, New Orleans, Louisiana 70113

3. On the Louisiana Attorney General, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to William J. Guste, Jr., Attorney General; Thomas S. Halligan, Assistant Attorney General; and Charles L. Patin, Jr., Assistant Attorney General, Department of Justice, P.O. Box 44005, Capital Station, Baton Rouge, Louisiana 70804.

Sessions, Fishman, Rosenson,
Boisfontaine & Nathan
Robert E. Winn (Trial Attorney)
J. David Forsyth
2500 Pan American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 581-5055

BY: _____

ROBERT E. WINN

Attorneys for Vera Gianechini, Individually and as Tutrix of the Estate of David Gianechini and as Executrix of the Estate of Ernest Gianechini